

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + affidavit of mailing

77-1267

To be argued by
DIANE R. EISNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1267

UNITED STATES OF AMERICA,

—against—

ZALMON SCHNITZER,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
DIANE R. EISNER,
*Assistant United States Attorneys
Of Counsel.*

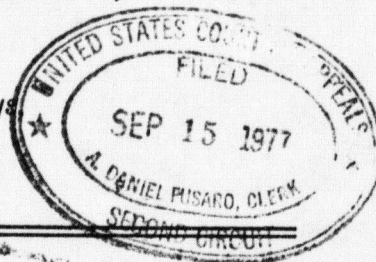


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Questions Presented	1
Statement of Facts	2
ARGUMENT:	
POINT I—The decision of the district court that, on balance, the circumstances of the instant case did not warrant an order expunging appellant's arrest records was entirely proper and should be affirmed	4
POINT II—The decision of the district court need not be vacated for lack of jurisdiction	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

<i>Eisler v. Stritzler</i> , 535 F.2d 148 (1st Cir. 1976) ..	10
<i>Hershel v. Dyra</i> , 365 F.2d 17 (7th Cir.), <i>cert. denied</i> , 385 U.S. 973, 87 S.Ct. 513 (1966)	6
<i>Paul v. Davis</i> , 424 U.S. 693, 96 S.Ct. 1155	7
<i>Shadd v. United States</i> , 389 F. Supp. 721 (W.D. Pa), <i>aff'd</i> . 535 F.2d 1247 (3d Cir. 1976)	7
<i>United States v. Dooley</i> , 364 F. Supp. 75 (E.D. Pa., 1973)	8, 9
<i>United States v. Huss</i> , 520 F.2d 598 (2d Cir. 1975)	10

	PAGE
<i>United States v. Linn</i> , 513 F.2d 925 (10th Cir.), cert. denied, 423 U.S. 836, 96 S.Ct. 63 (1975)	5, 7, 9
<i>United States v. Rosen</i> , 343 F. Supp. 804 (S.D.N.Y. 1972)	4, 5, 6, 7, 8, 9
<i>United States v. Seasholtz</i> , 376 F. Supp. 1288 (N.D. Okla., 1974)	6, 7, 9
<i>Webb v. United States</i> , (E.D.N.Y., Civil Action No. 77 C 429)	6, 8
<i>Statutes:</i>	
28 U.S.C. § 534	4, 8
28 U.S.C. § 1653	10, 11, 12

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UNITED STATES OF AMERICA,

—against—

ZALMON SCHNITZER,

Appellee,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by Zalmon Schnitzer from an order of the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch.J.*), entered March 10, 1977, denying appellant's motion for an order (1) expunging his arrest records, and (2) directing the return of fingerprints and photographs taken in connection with appellant's arrest on August 10, 1976.

Questions Presented

1. Did the District Court correctly determine that the facts of the instant case did not warrant granting an order of expungement?
2. Did the District Court have jurisdiction to entertain appellant's motion?

Statement of Facts

On July 27, 1976, a duly constituted grand jury in the Eastern District returned a two count indictment. Count One charged that appellant, along with one Leonard Fortgang, had conspired to defraud the Federal Insurance Administration, Department of Housing and Urban Development, by obtaining the payment of a false, fictitious and fraudulent claim under the Federal Crime Insurance Program, in violation of 18 U.S.C. § 286. Count Two charged Fortgang alone with bribery, in violation of 18 U.S.C. § 201(b). (Exh. B, pp. 1-2).¹

On August 10, 1976, appellant surrendered to the Federal Bureau of Investigation at the offices of the United States Attorney and was thereupon arrested. He advised that he would make no statements prior to conferring with his attorney, and no attempts at questioning were made. Appellant was then arraigned before the district court, pleaded not guilty, and was released after he and his father co-signed a \$10,000 personal recognizance bond. Prior to his release, appellant was fingerprinted and photographed by the United States Marshal.

Leonard Fortgang ultimately withdrew his plea of not guilty and pleaded guilty to Count Two of the indictment. Rather than obtain a superseding indictment against appellant, the Office of the United States Attorney thereafter decided to move for dismissal of the indictment against appellant, and to refer the matter for civil prosecution (Exh. E., pp. 2-3, Exh. A., p. 2). On Janu-

¹ Citations are to pages of appellant's appendix. The appendix contains no table of contents, nor are the pages consecutively numbered; however, each document in the appendix is designated with a letter. References to these documents will contain the Exhibit letter and page number of each exhibit.

ary 7, 1977, the court below dismissed the indictment (Exh. A., p. 2).

Appellant filed his motion for expungement of his arrest records and for return of all fingerprints and photographs taken on February 10, 1977. He alleged in the supporting affidavit of his attorney that he was a rabbinical student and that an arrest record would pose a "poignant" problem for him (Exh. D, p. 3). Appellant did not challenge the legality of the arrest, nor the validity of the indictment. He requested that the United States Marshal's Service and the Federal Bureau of Investigation be ordered (1) to expunge any and all of his arrest records and (2) to return to him any and all fingerprints and photographs taken in connection therewith (Exh. D, pp. 4-5).

The Government opposed the motion because under the circumstances here present, where the arrest and indictment were concededly lawful and no potential misuse of the records was demonstrated, the authorities are unanimous that expungement should not be granted (Exh. E, p. 4).

On March 9, 1977, the district court denied appellant's motion, concluding that under the facts of the instant case, "the interests of the government in effective law enforcement clearly outweigh those of [appellant]" (Exh. F, p. 6). Appellant filed his notice of appeal on April 21, 1977.

ARGUMENT

POINT I

The decision of the district court that, on balance, the circumstances of the instant case did not warrant an order expunging appellant's arrest records was entirely proper and should be affirmed.

(1)

Section 534 of Title 28 of the United States Code requires the Attorney General to acquire criminal identification records, to retain them, and, in appropriate circumstances, to exchange them with authorized officials of the Federal Government, the States, cities and penal and other institutions. The language of the statute clearly establishes the mandatory nature of the duty imposed. See *United States v. Rosen*, 343 F. Supp. 804 at 806 (S.D.N.Y., 1972).

In the instant case, appellant was arrested, fingerprinted and photographed after being indicted by a grand jury for conspiracy to defraud the Federal Insurance Administration, Department of Housing and Urban Development, by presenting a claim for payment from that agency, "knowing that such claim was false, fictitious and fraudulent" and that he was not entitled to payment (Exh. B, p.l.). Only after appellant's co-defendant had pleaded to a different count in the indictment did the Government ultimately decide that it would refer the charge against appellant for civil prosecution under the False Claims Act rather than seek a superseding indictment.

Appellant now seeks the return of all such criminal identification material as was acquired pursuant to his concededly lawful arrest. It is the Government's position

that such relief is neither authorized nor warranted in the instant case.

At the outset, it is to be noted that there is no statutory authority for an action seeking expungement of arrest records. The remedy exists as equitable relief, available in the courts only upon a showing that an arrest was without probable cause, was for harassment purposes only, or where the harm to the individual in the continued existence of the records is severely disproportionate to society's need to maintain extensive records as an aid in law enforcement. Appellant can satisfy none of the criteria thus far set by the courts to warrant the relief he seeks.

In *United States v. Rosen, supra*, a case similar to the instant case, charges were ultimately dismissed against the individual defendant Rosen, after the corporate defendant, of which he was president, pleaded guilty to several counts in an indictment which had named both Rosen and the corporation as defendants. After the dismissal, Rosen sought an order for expungement of his arrest records and return of all photographs and fingerprints taken in connection therewith. The court there noted that the question presented involved "a balancing of the equities between the right of privacy of the individual and the right of law enforcement officials to perform their necessary duties" 343 F. Supp. 806.

Following a review of the applicable law, the court in *Rosen* concluded that whether it be a dismissal or an acquittal, where the arrest was not unlawful, the record of the arrest not the "fruit" of an unlawful seizure, and there is no other statute which directs the return of such arrest records, they should be retained. 343 F. Supp. at 808.

Indeed, in *United States v. Linn*, 513 F.2d 925 at 927 (10th Cir.), *cert. denied*, 423 U.S. 836, 96 S. Ct. 63 (1975), the court noted that although courts do possess

equity powers to issue expungement orders, that power to expunge "is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case."

In the instant case, appellant concedes the legality of his arrest and the validity of the indictment (App. Br., p. 15). No unusual or extreme circumstances are alleged. Moreover, the dismissal of the indictment in this case was under circumstances indicating that the Government still intends to proceed against appellant for the offense charged, but for civil penalties rather than under the criminal law.

In dealing with expungement applications, courts have recognized that there is a "compelling public need for an effective and workable criminal identification procedure" *United States v. Seasholtz*, 376 F. Supp. 1288 (N.D. Okla., 1974). In *United States v. Rosen*, *supra*, the court stated (343 F. Supp. at 809):

"To permit law enforcement officials to retain arrest records, photographs or fingerprints promotes more effective law enforcement. Allowing the police broad discretion in retaining arrest records enables them to utilize more efficiently the facilities for combating crime. Moreover, arrest records may be vital in curbing the growth of crime."

While the retention of an arrest record may indeed infringe on an individual's privacy, it has been held that the retention of such a record violates no constitutional right to privacy. *Hershel v. Dyra*, 365 F.2d 17, 20 (7th Cir., 1966), *cert. denied*, 385 U.S. 973, 87 S.Ct. 513 (1966); *United States v. Rosen*, *supra*, 343 F. Supp. at 809; *Webb v. United States*, (E.D.N.Y., Civil Action No. 77 C 429, May 13, 1977).

In a recent decision, the Supreme Court indicated that it would not find arrest records to fall within a concept of protected privacy. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), the respondent sought redress for an alleged violation of constitutional rights, seeking damages as well as declaratory and injunctive relief under the Civil Rights Act, arising out of the dissemination of a folder wherein he was identified as a known shoplifter, even though the charges against him had been dropped. In holding that respondent did not state a federal cause of action, the Supreme Court reviewed its recognition of a constitutional right of privacy in zones of marriage, procreation, contraception, family relationships, and child rearing and education, and stated (96 S.Ct. at 1166):

"Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private', but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this and we decline to enlarge them in this manner."

In the instant case, appellant does not claim that his arrest records have been released, or even that there is potential misuse of these records. In such a situation, the court need only balance society's interest with appellant's desire for privacy. The Government knows of no cases in which expungement has been granted where there is such a total absence of extraordinary circumstances as in the instant case. See, *United States v. Linn*, *supra*; *Shadd v. United States*, 389 F. Supp. 721 (W.D. Pa., 1975), *affd.* 535 F.2d 1247 (3d Cir. 1976); *United States v. Rosen*, *supra*; *United States v. Seasholtz*, *supra*;

United States v. Dooley, 364 F. Supp. 75 (9.D. Pa., 1973); *Webb v. United States*, *supra*.

And significantly, in *United States v. Dooley*, *supra*, the court also admitted a concern for the practical administrative problems which would be created if the courts were to grant expungement motions in other than extraordinary situations and decided that expungement of arrest records is a question which should be dealt with as a legislative matter by the Congress, and not through judicial action. 364 F. Supp. at 79. However, the court in *United States v. Rosen*, *supra*, in declining to expunge, indicated that Congress had fashioned a limited mode of relief from unauthorized dissemination which indicated an awareness of the problem and a belief that the available relief was sufficient. 343 F. Supp. at 806.

The court in *Rosen* cited 28 U.S.C. § 534(a) (1) and (2), which requires the acquisition and retention of criminal identification materials and provides for the exchange of these materials with authorized officials, and then noted that 28 U.S.C. § 534(b) provides:

"The exchange of records authorized by subsection (a) (2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies."

In acknowledging this subsection of 28 U.S.C. § 534, the court concluded (343 F. Supp. at 806):

"It would seem that the Congress was aware of this problem and considered this appropriate action. I must assume, therefore, that the lawmakers have as a matter of public policy determined that the arrest records are to be retained, at least under ordinary circumstances."

Appellant has cited no authority for the relief he seeks, but rather rests his claim upon the unsupported

assertion that as a rabbinical student, he is bound to suffer severe hardship due to the existence of these arrest records (App. Br., p. 13). It is respectfully submitted that such assertions do not place appellant's case within the "narrow" class of cases where expungement has been declared appropriate. *United States v. Linn, supra*, 513 F.2d at 927.

POINT II

The decision of the district court need not be vacated for lack of jurisdiction.

The court below recognized that, as suggested by the Government, the instant action should more appropriately have been commenced as a separate civil action, rather than as a motion in the criminal action which was closed. However, the court noted that even had the matter been presented in a civil context, it would still have been assigned to the same judge as a matter related to the criminal action. Therefore, in the interests of judicial economy, the court decided to hear the motion, treating it as ancillary to the criminal indictment (Exh. F., p. 3). The same approach was explicitly adopted in *United States v. Dooley, supra*, with other courts entertaining like criminal motions without discussion of jurisdictional prerequisites. See, *United States v. Linn, supra*; *United States v. Rosen, supra*; *United States v. Seasholtz, supra*.

On this appeal, appellant asserts that the court below had ancillary jurisdiction to decide the motion (App. Br., p. 10), but contends that this jurisdiction was not properly invoked and that therefore the decision below should be vacated, without prejudice to appellant's commencing the action again; this time in a more appropriate manner.

While the Government still contends, as it did below, that actions such as the instant case should be commenced

as civil actions, with the Government having its full sixty days to answer or otherwise respond to the complaint, see Rule 12(a), Fed. R. Civ. P., it should be noted that no motion to dismiss was made below in recognition of the necessity for judicial economy, and in recognition of the frequency with which the courts entertain motions under the criminal docket number in expungement cases.

Likewise, in the interests of judicial economy, this Court's decision in *United States v. Huss*, 520 F.2d 598 (2d Cir. 1975), does not require that the decision below be vacated at this time for lack of jurisdiction. Although in *Huss* all of the alleged bases for jurisdiction ultimately failed, this Court nevertheless noted that it was "mindful of the statutory provision that [d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts^x, 28 U.S.C. § 1653" 520 F.2d at 602. In the instant case, even though jurisdiction was not affirmatively pleaded, there is no question that the court below would have had jurisdiction to entertain an application for the expungement of arrest records had the action been brought as a civil action, and it would not be in the interests of justice or judicial economy for the entire case to be relitigated now.

It is noteworthy that it is the appellant, who commenced the action below, who now attacks the district court's jurisdiction to hear the matter. Admittedly, appellant attempts to gain only the opportunity to set forth more extensive pleadings so that, should the court again deny his motion, he will have a stronger argument on the equities on a subsequent appeal (App. Br., p. 11-12).

The situation in *Eisler v. Stritzler*, 535 F.2d 148 (1st Cir., 1976) is analogous on this point. In *Eisler*, the defendant admitted diversity jurisdiction in his pleadings, denied the facts which would have given rise to liability, and pleaded affirmative defenses and counterclaims.

Defendant thereafter resisted plaintiffs' attempts to take his deposition for over three years. Plaintiffs finally moved for sanctions, and succeeded in having defendant's answers and counterclaims stricken, and an order of default entered. At this point, defendant moved to vacate the default. In support of a motion to dismiss, defendant for the first time challenged the existence of diversity jurisdiction. The district court denied the motion and the court of appeals vacated and remanded for further proceedings.

In its decision, the First Circuit concluded that jurisdiction may be raised at any time, and as to any of the causes of action which relied only on diversity jurisdiction, the matter would be remanded for a hearing on the existence of such diversity jurisdiction at the time the action was brought. However, although the entire action had been premised only on diversity jurisdiction, the court went on to state (535 F.2d, p. 152, fn. 3):

"The only impediment to affirming the district court's exercise of jurisdiction over some of the counts is that plaintiffs' complaint did not contain a statement of the grounds upon which the court's jurisdiction actually depended, as is required by Fed. R. Civ. P. 8(a), since it relied solely upon the diversity of citizenship grant of jurisdiction. This defect is not fatal. Under the curative provisions of 28 U.S.C. § 1653, the missing allegations may be supplied at any time, including on appeal. Since we conclude that the district court had federal question jurisdiction over at least portions of this lawsuit, it would be a baseless formality to require plaintiffs to amend their complaint, and we consider plaintiffs' complaint to be amended as alleging jurisdiction under 15 U.S.C. § 78aa and 28 U.S.C. §§ 1331, 1337. See *Norton v. Larney*, 266 U.S. 511, 45 S.Ct. 145, 69 L.Ed. 413 (1925)."

Although the court noted that it was normally disinclined to find alternative grounds for the district court's jurisdiction, *sua sponte* on appeal, it stated that, "there is no impediment to our doing so, *cf.* 28 U.S.C. § 1653, and we deem it to be entirely appropriate here where the only individual who has an interest in the dismissal of this case appears on the record to have disregarded consistently his obligation to respond to court orders." 535 F.2d at 152.

The instant case is also one in which it is entirely appropriate to recognize a jurisdictional basis for the action of the district court despite appellant's failure to plead it. Appellant commenced this action and clearly set forth his claim for relief. The district court found the relief to be unwarranted and summarily denied the motion. Appellant is the only one who has an interest in the dismissal of the instant case, so that through repleading he can attempt to appeal with greater particularity to the court's discretion. Under these circumstances, it is respectfully submitted that this Court should note the existence of a jurisdictional base in the district court, and deem any missing allegations of jurisdiction to be supplied under 28 U.S.C. § 1653.

CONCLUSION

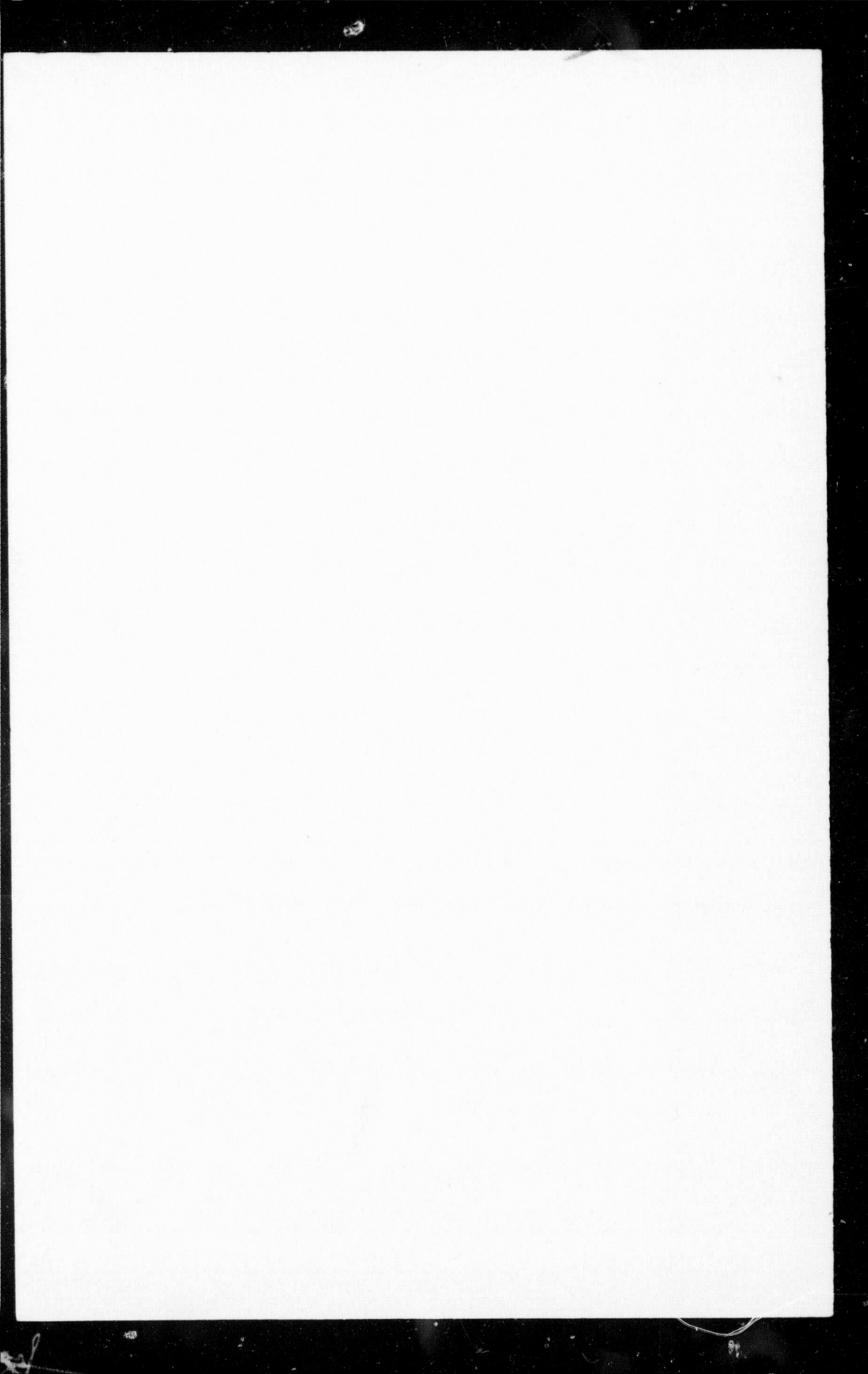
The order of the district court should be affirmed with costs.

Dated: Brooklyn, New York
September 12, 1977.

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
DIANE R. EISNER,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of Sept. 19 77 he served a copy of the within

by placing the same in a properly postpaid franked envelope addressed to:
Salmon Schnitzer

100 Ross Street #1H

Brooklyn, New York 11211

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

15th day of Sept. 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646324
Qualified in Kings County
Commission Expires March 30, 1979

